87-1255

Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT D. KAPLAN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented for Review.

(1) Is it ever constitutionally permissible under this Court's holding in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), for the Court of Appeals to apply the "harmless error" doctrine in a case where the Court concluded that:

> (a) the trial court erred in preventing the defense from eliciting the invocation of the privilege against self incrimination from a prosecution witness in response to a relevant line of questioning about the witness's drug use during the time period about which he was testifying; and
>
> (b) the witness was the only prosecution witness who testified directly regarding the only contested element of the crime?

(2) Assuming that it might sometimes be proper in the above context to find that the constitutional error of the type made here was harmless, was the application of the harmless error doctrine proper on the facts of this case?

Table of Contents.

Questions Presented i

Table of Authorities Cited iii

Opinion Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 10

I. It Can Never Be Proper To Apply The "Harmless Error" Doctrine Where The Error Was The Exclusion On Cross-Examination Of The Fifth Amendment Responses Of The Only Prosecution Witness To Testify To The One Disputed Element Of The Crime And Where It Must Be Assumed That The Witness Would Have Been Fully Impeached Had The Line Of Questioning Been Allowed. 10

II. Even Assuming That It Might Sometimes Be Proper In The Above Context To Find That A Constitutional Error Of The Type Made Here Was Harmless, The Court Of Appeals Mis-Applied The "Harmless Error" Doctrine On The Facts Of This Case. 13

Conclusion 14

Appendix follows page 14

Table of Authorities Cited.

CASES.

Chapman v. California, 386 U.S. 18 (1967) 13

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 6, 12, 13

Robinson v. California, 370 U.S. 660 (1962) 12

United States v. Cincotta, 689 F.2d 238 (1st Cir. 1982), *cert. denied*, 459 U.S. 991 (1982) 7

United States v. Seifert, 648 F.2d 557 (9th Cir. 1980) 6, 11

CONSTITUTIONAL PROVISIONS.

United States Constitution

Fifth Amendment 2, 4, 5

Sixth Amendment 2

STATUTES.

United States Code

18 U.S.C. § 1254 2

18 U.S.C. § 1341 3

18 U.S.C. § 3231 3

Massachusetts General Laws

Chapter 112, § 61 10

OTHER AUTHORITIES.

J. Weinstein & M. Berger, 3 *Weinstein's Evidence* (1987) 11

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner Robert D. Kaplan ("Kaplan") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on November 2, 1987.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit is attached hereto as Appendix pages 1a through 22a.[1]

[1] For the convenience of the Court, all references to the Appendix attached to this Petition are cited as e.g., "1a" to denote the Appendix page. References

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was rendered and entered on November 2, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. Upon the Petitioner's motion, Justice Brennan of this Court entered an Order on December 28, 1987 extending until January 31, 1988 the time for filing this Petition.

Constitutional Provisions Involved.

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been

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to the Trial Transcript are cited as, e.g., "Tr. 1/2" to denote the Transcript volume and page, and references to the Appendix filed in the Court of Appeals are cited as App. "I/2" to denote the volume and page of that Appendix.

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statement of the Case.

I. Statement of Facts.

A. *Introduction.*

The Petitioner was charged with mail fraud under 18 U.S.C. § 1341. The District Court exercised original jurisdiction pursuant to 18 U.S.C. § 3231. The indictment alleged that Kaplan, certain medical doctors and a chiropractor participated in a scheme to defraud insurance companies in motor vehicle accident cases by submitting false, inflated and "back-dated" medical bills and reports to insurers. According to the government, the scheme continued from 1973 until early 1981, when the doctors were indicted. Trial took approximately 19 days, and the trial judge charged the jury on actual knowledge and on willful blindness, or conscious avoidance of knowledge. Kaplan was convicted after approximately six days of jury deliberations.

B. *Facts Material to Consideration of the First Question Presented.*

The thrust of the government's proof was offered to show that Kaplan either knew of or willfully blinded himself to evidence that many of the doctors' bills submitted to the Kaplan law office were false. In its opinion, the Court of Appeals noted

that the falsity of these bills was undisputed, and that Kaplan's defense was that he lacked actual knowledge of the false billing. 3a.

In affirming the verdict, the Court of Appeals pointed to certain facts in support of the willful blindness instruction,[2] and then took note that just a single witness, Alan Brown, testified that Kaplan had actual knowledge that a doctor's bill was false. 12a. Specifically, Brown testified that he told Kaplan personally that the bill of the chiropractor, Stuart Rosenthal ("Rosenthal") was false in a case in which the law office was representing Brown. Tr. 10/97-98. Nonetheless, Brown testified, Kaplan went ahead and settled the case, obtaining money for Brown from the insurer. *Id.* at 99-100. Thus, Brown's testimony alone was sufficient to convict Kaplan on the theory of actual knowledge of false billing, as opposed to conscious avoidance of such knowledge.

Despite the critical nature of Brown's testimony, the Petitioner was not allowed to put before the jury on cross-examination Brown's repeated invocations of the Fifth Amendment on *voir dire* regarding his use of cocaine and other non-prescription drugs at every key juncture beginning with his 1975 accident and extending through his treatment, representation by the law firm, interview with a postal inspector, grand jury appearance and trial testimony itself. See 11/2-8. The trial court ruled that no questions regarding Brown's drug use could be asked of him on cross-examination because he would answer them by invoking his privilege. Tr. 11/2.

As stated by the Court of Appeals, Kaplan specifically sought to put Brown's Fifth Amendment responses before the jury both to challenge Brown's perception and memory and to

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[2] The Petitioner objected to the willful blindness instruction, arguing that it was not sufficiently supported by the evidence. Tr. 19/13.

show his bias. 12a.[3] The Court of Appeals held that the judge's refusal to force Brown to assert his Fifth Amendment privilege

[3]The issue of Brown's responses arose in the following context: Before the start of Brown's testimony, defense counsel raised the issue of Brown's cocaine use, and represented that he had evidence from third persons regarding Brown's use and distribution of cocaine. Tr. 10/74. The judge stated that she would reserve her ruling until the end of Brown's testimony. *Id.* Brown then testified on direct that he had visited Rosenthal's office just once, not the 15 times stated on Rosenthal's bill, and that he had not been disabled for four weeks as Rosenthal had indicated. Tr. 10/85.

Brown went on to testify that at a pre-trial meeting, unidentified law office employees had described to him the inside of Rosenthal's office, the machinery and apparatus it contained and the types of treatment he was supposed to have undergone. Tr. 10/96. Brown also testified that he thought he had told Kaplan in a separate conversation just before trial that the bills were inflated and that "I had never been in the [doctor's] offices, but once." *Id.* at 97-98.

At the close of the day's evidence, Brown's attorney stated that he would advise Brown to invoke the Fifth Amendment if asked about his cocaine usage. Tr. 10/120-121. At the start of proceedings the next morning, before any *voir dire* had been conducted, the judge informed counsel that given Brown's intention to assert the Fifth Amendment, she found the evidence of his cocaine usage to be of marginal relevance far outweighed by its prejudicial effect. Tr. 11/2. The government's counsel then expressed what he said was his understanding based on conversations with Brown and his counsel, that if asked about whether Brown had used cocaine on or about "the date of the accident, the day he talked to Mr. Kaplan, those six or seven or eight dates between '75 and '77, [Brown's] answer would be no . . ." Tr. 11/3.

As the subsequent *voir dire* demonstrated, the government's stated understanding was completely incorrect. On advice of counsel, Brown asserted the Fifth Amendment as to questions involving his use of cocaine and all other non-prescription drugs for the time periods from (1) the date of the accident in 1975 and his representation by the law firm through the 1977 settlement, (2) his 1985 interview with a postal inspector, (3) his 1985 grand jury appearance and (4) the trial itself. Tr. 11/7-8. The government argued that such cross-examination would just put before the jury questions "to which there would be no answer," and the judge excluded the evidence, stating that it was of marginal relevance far outweighed by its prejudicial effect. 13a.

Following the ruling, counsel attacked Brown's credibility by focusing on the inconsistencies in his testimony and his poor memory, as well as by reference to certain false statements he made when first interviewed by a postal inspector. According to the Court of Appeals, Kaplan was afforded a sufficient opportunity to attack Brown for bias because Brown admitted his belief that he

before the jury was error, citing *United States* v. *Seifert*, 648 F.2d 557 (9th Cir. 1980).[4] Recognizing the powerful impeachment value of the Fifth Amendment responses, the Court stated:

> Kaplan was entitled not to be denied the jury's likely inference, from Brown's assertion of the privilege, that Brown was using cocaine around the times relevant to his testimony, and to the secondary inference that his powers of memory or observation thus may have been impaired.

16a.[5]

The Court of Appeals held the trial judge's error to have been harmless, notwithstanding the rule articulated in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) that in applying harmless error

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was testifying under immunity negotiated by his attorney. 13a. However, early in cross-examination, it was established that Brown did not have immunity, but rather that he had been told that he was not a target or subject of the grand jury investigation. See Tr. 11/10. Thus, following the ruling excluding Brown's Fifth Amendment responses, there was no questioning probative of bias.

[4] To the knowledge of the Petitioner's counsel, only the *Seifert* case and the case at bar have raised the issue of keeping from the jury on cross-examination the invocation on *voir dire* of the Fifth Amendment privilege by a witness who has provided highly damaging testimony on direct on behalf of the government.

[5] The Court of Appeals holding makes plain its determination that the judge's ruling excluding the responses violated Kaplan's Sixth Amendment rights.

First, the Court stated, citing this Court's decision in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986): "[n]one of the permissible reasons for circumscribing the scope of a criminal defendant's *constitutional right* to cross-examination . . . warranted such a ruling." 15a-16a. (emphasis added). Second, the Court applied the test articulated in *Van Arsdall* for evaluating constitutional erorr in the Sixth Amendment context. *See* 475 U.S. at 684. In doing so, the Court held that the error was harmless beyond a reasonable doubt, justifying this determination based on what the Court said was "substantial other evidence of guilty knowledge before the jury and the thorough cross-examination [of Brown] permitted." 16a. The Petitioner submits that there was insufficient evidence of guilty knowledge other than Brown's testimony, and addresses that issue at pp. 7-9, *infra*.

analysis the defendant is entitled to the assumption that the witness would have been fully impeached had the excluded testimony been allowed. *See* 475 U.S. at 684.

C. *Facts Material to Consideration of the Second Issue Presented.*

Virtually all of the government's evidence was offered by design in support of the willful blindness theory.[6] As stated by the Court of Appeals, Kaplan's defense was based on "the absence of specific intent, namely that he never participated in the doctors' scheme knowing it to be fraudulent." 3a.

In support of the defense theory, Kaplan offered extensive evidence that (1) he established a substantial personal injury practice years before he met the two doctors, Rosenthal and Hershenow, whose cases were the focus of virtually all of the government's evidence; (2) the Kaplan law office developed a system for handling all personal injury cases which it used from the early 1970's up through the trial; (3) under this system, Kaplan exercised a general oversight function in the office while legal assistants did almost all the day-to-day work on cases; (4) no employee of the law firm ever told Kaplan that any medical bill or report was known or suspected to be false; (5) no doctor ever informed anyone at the law firm that any bill or report was false; and (6) the bills and reports of the four doctors identified in the indictment looked no different

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[6] At the start of the trial, the prosecutor stated at sidebar: "Well, the key question is going to be whether or not the law firm had reason to know that these were false . . . [*United States* v. *Cincotta*, 689 F.2d 238 (1st Cir. 1982), *cert. denied*, 459 U.S. 991 (1982)] says that if things are brought to your attention that a reasonable man would investigate and you don't do that, then the jury can infer that the reason you don't do that is because you know, even though you are not certain that these are false and you just don't want the information." Tr. 2/4.

from those sent to the law firm by all other medical providers treating the office's clients during the 1973-1980 period. The extensive evidence regarding the law office system was offered through the testimony of five attorneys and six legal assistants, who established that the system was designed to process a high-volume caseload[7] and contained numerous checks on the reliability of medical and disability information.[8] Other evidence, including testimony of the doctors themselves, established that they falsified bills on their own without the knowledge of Kaplan or his employees.[9]

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[7] By the mid-1970's, the Kaplan law offices was accepting 800-1,000 new cases per year. Tr. 9/66. The number of employees grew from 6-7 in 1972 to 15-18 by 1976. Tr. 15/50, 16/37.

[8] The system operated as follows: New clients were interviewed by a legal assistant, who obtained necessary information, explained the clients' rights and secured appropriate authorizations to obtain information. Tr. 9/78, 12/87, 14/97, 15/7, 16/43, 45, 18/14, 34. Injured clients who had no personal physician were given the names of three or four doctors from an alphabetical referral list of doctors compiled based on such factors as willingness to treat accident patients on short notice, geographic proximity and willingness to write timely reports. Tr. 8/38, 9/70, 83-85, 12/93-96, 14/99, 15/8, 16/44, 17/49-50, 18/35. Assistants testified that Kaplan never directed or suggested that they refer clients to any particular doctor. Tr. 12/94, 17/21.

After the initial interview, assistants did virtually all of the follow-up work on the cases, e.g., contacting clients at regular intervals to verify continuing treatment, communicating with medical providers to obtain bills and reports and forward them onto insurers and scheduling insurance examinations conducted on a regular basis by doctors (including one doctor named in the indictment) approved and paid by the insurers. Tr. 2/38-39, 8/117-118, 9/86-90, 11/97, 12/109, 15/7, 16/48-50, 56-57, 18/35-37, 53.

Finally, other evidence established that in fully one-third of the case files for cases involving Rosenthal and Hershenow, clients signed sworn interrogatories, doctors signed sworn medical affidavits or both verifying the correctness of the doctors' bills. Tr. 18/76-77; App. I/135-150.

[9] Several law office employees testified that they relied on the accuracy of information received from clients and doctors, that Kaplan directed them to provide correct information to insurers and to investigate any discrepancies, and that in the few cases where discrepancies were noticed, the matter was investigated so that correct information could be obtained. Tr. 9/90, 10/9, 20,

The Court of Appeals pointed to a handful of pieces of evidence (while stating they were not exhaustive) in support of its holding that a willful blindness instruction was appropriate. The Petitioner respectfully submits that the Court of Appeals misread the record, and that a careful review demonstrates that even indulging all inferences in the government's favor the issue whether Kaplan consciously avoided knowledge was extremely close.[10]

12/128-129, 134-135, 15/97-98, 16/56-57, 18/32, 37, 53. Other evidence established that the doctors presented impressive credentials to the law office. Rosenthal, for example, served as President of the Greater Boston Chiropractic Society during the period when he was treating the law-office clients, and Hershenow was performing examinations for several insurance companies and for the Federal Aviation Administration throughout the 1970's and into the 1980's. Tr. 2/57, 5/39-40, 13/130-131. In addition, the testimony of several law office employees as well as extensive documentary evidence established that the bills and reports of the doctors in question looked no different from those of all other medical providers treating or examining law office clients, including doctors retained by the insurance companies, during the relevant periods, and this evidence was supported by the testimony of the insurance claims supervisor called by the government. *See e.g.*, 2/44-45, 48, 54-55, 12/104-105, 18/46, 59; App. I/188-253.

Finally, the testimony of Rosenthal and Hershenow, who both testified under immunity, made clear that they falsified bills on their own. Rosenthal stated that (1) he never informed any employee of the office that he had falsified a bill or report; and (2) he had not told Kaplan about false bills or reports because he was afraid that if he did so, Kaplan would cut off all referrals to him Tr. 5/26, 6/109. Similarly, Hershenow testified that (1) he falsified many bills and reports throughout the 1973-1980 period, but that Kaplan never asked him to do so; (2) he never informed Kaplan that he had falsified bills and reports; (3) his first meeting with Kaplan had been his only one, he never went to Kaplan's office and his only other conversation with Kaplan had been in 1980 or 1981 when Kaplan had called to speak to a doctor with whom Hershenow was sharing space; (4) he never told anyone at the law office that any of his bills, reports or sworn medical affidavits were false; and (5) after Rosenthal had introduced him to the practice, he falsified bills on his own. Tr. 13/128-130, 14/2, 28-30, 128-130.

[10] The following are examples of the several mistaken factual assumptions relied on by the Court of Appeals:

(1) The Court cited evidence regarding a law office client named Neustadt as demonstrative of Kaplan's "seemingly deliberate aloofness to the scheme." *See* 6a. According to the Court of Appeals, "the Boston Municipal Court expressly found that Rosenthal's treatments in that case were unreasonable and

Reasons for Granting the Writ.

I. It can Never be Proper to Apply the "Harmless Error" Doctrine Where the Error Was the Exclusion on Cross-Examination of the Fifth Amendment Responses of the Only Prosecution Witness to Testify to the One Disputed Element of the Crime and Where it Must be Assumed That the Witness Would Have Been Fully Impeached had the Line of Questioning Been Allowed.

The thrust of the government's case was that Kaplan consciouisly avoided knowledge of wrongful acts by the doctors,

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unnecessary . . ." but that "Kaplan continued to refer clients to Rosenthal without ever inquiring about the court's findings." *Id.* In fact, Rosenthal and Kaplan did discuss the case as well as a subsequent administrative complaint based on the judicial finding and filed with the Massachusetts Board of Registration of Chiropractors, the agency specifically charged with responsibility for monitoring chiropractic performance within the state. *See* Mass. Gen. Laws c. 112, § 61. In that proceeding, the Board conducted an evidentiary hearing and then exonerated Rosenthal, disagreeing with the court's determination and finding that Rosenthal had not violated existing regulations regarding over-utilization of supportive procedures or excessively charged the patient. Tr. 4-135. The Board's decision, which Rosenthal communicated to Kaplan, was that Rosenthal had *not* violated any statutes or regulations. *Id.*

(2) The Court suggested that two cases involving the Petitioner's mother and wife were "particularly egregious" based on the doctors' internal records, *see* 5a-6a, which indisputably were not shown to Kaplan or his employees. As to Kaplan's mother's case, Rosenthal claimed after reviewing his files that he had provided bills with extra visits added. Tr. 2/109-110, 122-123. Later, however, he said he was unsure whether he had treated Kaplan's mother on more than the six visits listed in his notes, and other evidence established that (1) the suit in her case had been brought not by the Kaplan law office but by Esdaile, Barrett & Esdaile, Tr. 17/111; and (2) Kaplan's mother's medical bills had exceeded $500 before she ever visited Rosenthal, so that she was entitled to bring suit without reference to his medical charges. Tr. 17/112-113.

Similarly, regarding Kaplan's wife's case, the Court took note that Kaplan had not submitted Rosenthal's bills to the insurer, which would have entitled Mrs. Kaplan to bring a third-party action. 6a. The Court did not discuss the unrebutted testimony of Mrs. Kaplan to the effect that (1) Rosenthal had treated her without charge as a professional courtesy on several occasions prior to her accident; and (2) Rosenthal's bill for treatment after the accident had not been submitted because it had not been clear how much of her injury was attributable to her pre-existing condition. See Tr. 5/128-129, 16/125-129.

and the evidence of willful blindness was bitterly contested. In this context, the testimony of Brown was absolutely critical, because Brown was the only witness to testify directly as to the only disputed element of the crime, Kaplan's knowledge of false billing, and because standing alone Brown's testimony was sufficent to convict Kaplan. Again, Brown testified that he told Kaplan personally that his doctor's bills were false, but that Kaplan went ahead and obtained a settlement from the insurer on Brown's behalf.

There can be no doubt that the foreclosed line of inquiry was clearly relevant. As the Court of Appeals stated, "the credibility of a witness can always be attacked by showing that his capacity to observe, remember or narrate is impaired." 16a, citing J. Weinstein & M. Berger, 3 *Weinstein's Evidence*, ¶ 607[04], at 607-55 (1987). Moreover, as the Court of Appeals held, any danger of prejudice from the excluded line of questioning was small in comparison to its impeachment value. *Id.*, citing *Seifert, supra.*

The Court of Appeals correctly noted that defense counsel did impeach some parts of Brown's testimony by attacking certain inconsistencies and showing that he made false statements to a postal inspector. *See* 14a. However, the impeachment necessarily was of limited effect for two reasons. First, the core of Brown's testimony, that he told Kaplan about false billing, remained intact at the end of his cross-examination. Second, Kaplan was deprived of the opportunity to provide the jury with an easily acceptable explanation for the damaging core testimony, *viz.*, that Brown had an honest failure of perception or memory based on his long-term and continuing cocaine usage.[11] Instead, defense counsel was left to attack Brown based on his earlier false statements to the postal inspec-

[11] The Court of Appeals recognized the ease with which the jury would have drawn such an inference. *See 16a.* ("Kaplan was entitled not to be deprived of benefit of the *likely* inference. . . .") (emphasis added).

tor, a somewhat toothless attack given Brown's ready admission that he had lied earlier.

As to the strength of the impeachment value of the excluded line of questioning, in applying harmless error analysis it must be assumed that Brown would have been fully impeached if the questioning had been allowed. As this Court stated in *Van Arsdall*, in the context of the constitutionally improper restriction on the defendant's right to cross-examine for bias,

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say the error was harmless beyond a reasonable doubt.

475 U.S. at 684.

Again, Brown's testimony was the only direct evidence of actual knowledge, the only disputed element of the crime, and as such that testimony provided an easy basis on which the jury could convict Kaplan. This was so especially because Brown's testimony was presented in the context of a trial whose focus was on the intrinsically difficult and complex question of conscious avoidance of knowledge. In the Court's consideration of the harmless error issue, the Petitioner is entitled to the assumption that the jury convicted Kaplan by the easiest means possible, i.e., by accepting Brown's testimony. *See Robinson* v. *California*, 370 U.S. 660, 665 (1962). A contrary conclusion is not supportable for the simple reason that it cannot reasonably be argued that the jury did, beyond a reasonable doubt, reject the straight and simple route to conviction via Brown's testimony and chose instead to resolve the complicated and bitterly contested evidence on the willful blindness issue against Kaplan. Plainly, the possibility cannot

be excluded that Brown's "not-fully-impeached (testimony) *might have* affected the reliability of the factfinding process at trial," *see Van Arsdall, supra*, at 684 (emphasis added), and thus the error here cannot have been harmless beyond a reasonable doubt. *See Chapman* v. *California*, 386 U.S. 18, 23 (1967) (Error is harmless only if no "reasonable possibility [it] might have contributed to the conviction.")

II. Even Assuming That it Might Sometimes be Proper in the Above Context to Find That a Constitutional Error of the Type Made Here Was Harmless, the Court of Appeals Mis-Applied the "Harmless Error" Doctrine on the Facts of this Case.

Even assuming that it might be proper in some context to find that a constitutional error of the type made here was harmless, application of the factors articulated in *Van Arsdall, supra*, demonstrates that the error here was not harmless. The factors identified by this Court in *Van Arsdall* were the following: (1) the importance of the witness's testimony in the prosecution's case, (2) whether his testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case.

First, as discussed at length, *supra*, Brown's testimony was extremely important because he was the only person to testify that Kaplan had actual knowledge, the only contested element of the crime. Second, while some parts of Brown's statements could be challenged, no meaningful cross-examination could be conducted because the imposed limitation rendered his core testimony unassailable. Finally, Brown's testimony, sufficient as it was to convict Kaplan, must be viewed in the context of

a bitterly contested case where virtually all of the evidence went to the issue of conscious avoidance of knowledge, and a case which, even indulging all inferences in the government's favor, was extremely close. For all of these reasons, the trial court's error was not harmless, and this Court should grant a writ of certiorari.

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this case on November 2, 1987.

Respectfully submitted,

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Table of Contents.

Appendix.

Opinion of the United States Court of Appeals for the First Circuit dated November 2, 1987 1a

United States Court of Appeals
For the First Circuit

No. 86-1557

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT D. KAPLAN,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Torruella, *Circuit Judge*,
and Maletz,* *Senior Judge*.

Alan M. Dershowitz with whom *Robert D. Keefe, Robert W. Thuotte, Nancy A. McCann* and *Hale and Dorr* were on brief for appellant.

Peter A. Mullin, Assistant United States Attorney, with whom *Robert S. Mueller, III*, United States Attorney, was on brief for appellee.

November 2, 1987

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*Of the United States Court of International Trade, sitting by designation.

TORRUELLA, *Circuit Judge*. This case presents yet another example of an overly ambitious lawyer who finds himself convicted of knowningly and willfully participating with members of the medical profession in a scheme to defraud insurance companies in violation of 18 U.S.C. § 1341 (mail fraud) and § 2 (aiding and abetting in the commission of mail fraud). *See, e.g., United States* v. *Krowen*, 809 F.2d 144 (1st Cir. 1987); *United States* v. *Lebovitz*, 669 F.2d 894 (3d Cir.), *cert. denied*, 456 U.S. 929 (1982); *United States* v. *Drury*, 687 F.2d 63 (5th Cir. 1982), *cert. denied*, 461 U.S. 943 (1983); *United States* v. *Shavin*, 287 F.2d 647 (7th Cir. 1961).

On September 6, 1985, a grand jury returned a 15 count indictment against Robert D. Kaplan (Kaplan) for having mailed to insurance companies claims containing fraudulent medical bills and reports in motor vehicle accident cases. After a 24 day trial a jury found Kaplan guilty on 14 of the counts. On appeal the assignment of errors relates to the denial of motions for a new trial and judgment of acquittal, jury instructions, the limitation of an opportunity for cross-examination, and to the admissibility of evidence. We affirm.

Background

During the relevant period of the indictment (from about 1973 through at least February 12, 1981), Massachusetts operated under a "no fault" automobile insurance system. The plan required an owner of a vehicle registered in the state to purchase personal injury protection ("PIP"). Under PIP coverage, a party injured in an accident could claim (regardless of fault) from the owner's insurer all reasonable and necessary expenses and a percentage of lost wages, up to a maximum of $2,000. *See* Mass. Gen. Laws Ann. ch. 90, § 34A (West Supp. 1986). A negligence suit (referred to by Kaplan as a "third-party case") could not be brought unless *the medical expenses exceeded $500* or the accident resulted in death, disfigurement, fracture, or loss of a "body member," sight, or hearing. Mass. Gen. Laws Ann. ch. 231, § 6D (1985).

Kaplan became acquainted with the "no fault" law from his high-volume personal injury practice. The typical motor vehicle accident case handled by Kaplan involved relatively minor "soft-tissue" injuries such as neck and back pain as opposed to "hard tissue" injuries (*e.g.* fractures). Briefly, the scheme operated as follows. If the client lacked his own physician, Kaplan would select for him a doctor from a "referral list" of forty to fifty medical providers. The list included doctors Hershenow, Rosenthal, Strauss, and Roodin who, it is uncontested, falsified bills by charging patients for visits that never occurred. Acting under Kaplan's directions, the doctor would send directly and only to Kaplan the patient's medical bills and reports. It is undisputed that Kaplan then would forward these, with the claim, to the insurer. Kaplan would distribute the award to his client, and would recommend to him how much to pay the doctors (the client would note that figure in a "direction to pay" form). Normally, Kaplan paid the doctors two-thirds of their bills and almost always by money orders. This set up was an economic incentive for Kaplan. In the PIP cases, Kaplan retained an amount based on an hourly fee to process the claim, whereas in the third-party case — *that is, when the bills exceeded the $500 threshold* — Kaplan operated under a contingent fee agreement retaining one-third of the recovery obtained by the client.

Kaplan's defense rests on the absence of specific intent, namely, that he never participated in the doctors' scheme knowing it to be fraudulent. This claim of innocence was supported by the following: 1) in the third-party cases medical providers were required by law to sign affidavits attesting the accuracy of their bills (and that Kaplan relied on the presumptively correct reports); 2) Kaplan's clients answered interrogatories propounded by insurance companies assuring that the amount charged by the doctor was accurate; 3) no medical provider ever told Kaplan about any false bills; 4) his employees did not know of or suspect the fraudulent scheme; and 5) because of

the high workload at the law firm it was not unreasonable for Kaplan to lack knowledge of the scheme.

I. *Sufficiency of the Evidence*

Kaplan argues that the court erred in denying a motion for judgment of acquittal because the evidence was legally insufficient to sustain the verdict. There is no dispute here about the existence of a fraudulent scheme and the mailings as elements of mail fraud. The only issue is whether the jury had enough evidence to find beyond a reasonable doubt that Kaplan knowingly participated in the scheme.

For us to sustain the jury's determinations we need not find a "smoking gun," in the sense that Kaplan had been told "the bills are false, do not mail the claims." It is sufficient if from the admissible circumstantial evidence a jury can infer and conclude beyond a reasonable doubt that indeed he knew the falsity of these claims. *United States* v. *Tierney*, 760 F.2d 382, 384 (1st Cir.), *cert. denied*, 106 S. Ct. 131 (1985); *United States* v. *Cincotta*, 689 F.2d 238, 241 (1st Cir.), *cert. denied*, 459 U.S. 991 (1982). In reviewing for sufficiency, we consider the evidence in toto — together with all legitimate inferences that can be drawn from the evidence — in the light most beneficial to the government. *See, e.g., United States* v. *Rothrock*, 806 F.2d 318, 320 (1st Cir. 1986).

The scheme apparently grew out of a 1973 contact between Rosenthal, a chiropractor, and Kaplan. Rosenthal testified under immunity that Kaplan had agreed to refer clients to him, and in consideration Kaplan would pay him two-thirds of his billings. The other one-third, Kaplan had said, would go back to his clients or would be used to thank those who referred business to him. Payments were made by money orders, apparently to facilitate income tax evasion and to encourage the medical providers to accept less than payment in full. Rosenthal also testified that he recruited Dr. Hershenow, an internist, and told him about the financial arrangements with Kaplan.

According to Rosenthal, Kaplan got "angry" upon learning about this and told Rosenthal never again to discuss this subject matter with anyone. Yet Hershenow testified that he later met with Kaplan when the latter explained the importance of the $500 threshold for medical expenses in the third-party cases. Hershenow agreed to accept referrals and partial payments from Kaplan only if the patients were actually injured in an accident. During their conversations, Kaplan told him that one-third of his bill was payable to auto body shops and to insurance companies which referred clients to the law office. If Hershenow himself did the referrals, Kaplan would pay him one-hundred percent on the amount of his bills.

Not all doctors acquiesced in Kaplan's financial ideas. Dr. Taylor, a radiologist, testified under immunity that he complained to both Kaplan and Bernstein, Kaplan's office manager, that added fixed costs for radiological services had made it impossible for him to accept untimely and discounted payments. Taylor testified, uncontradicted by Bernstein's testimony at trial, that Kaplan had said that if he was unwilling to go along with it the office could refer clients to other "more cooperative" radiology services. Taylor said that subsequently Kaplan's referrals fell "almost to zero."

The pervasiveness of the fraud and the nature of the cases under Kaplan's responsibility laid the foundation for a permissible inference of knowledge. For example, Rosenthal testified that from 1973 through part of 1980 he accepted some 500 referrals from Kaplan of which 250 had false bills and reports. As extracted by the government from Rosenthal's internal medical files, some cases were particularly egregious. Rosenthal said that in the Bella Kaplan case (appellant's mother) he had inflated the number of visits for treatment. Kaplan had called Rosenthal to inform him that an investigator from the "fraudulent claims bureau" had questioned him regarding his mother's claim. Although Kaplan urged Rosenthal to verify the records,

he never questioned the bills. The evidence also shows that Kaplan filed a PIP application on behalf of his wife. Yet Kaplan did not include Rosenthal's bill with the application in spite of the fact that this additional bill would have entitled her to bring a third-party action for negligence. The jury could well have concluded that Kaplan did not include the bill because he knew it was false.

The Neubstadt case is a good illustration of Kaplan's seemingly deliberate aloofness to the scheme. In that case, the Boston Municipal Court expressly found that Rosenthal's medical expenses were unreasonable and unnecessary. Yet Kaplan continued to refer clients to Rosenthal without ever inquiring from Rosenthal about the court's findings. And the insurers themselves gave Kaplan sufficient reason to believe the existence of wrongdoing. In the Howsworth case a claims adjustor wrote to Kaplan in 1974 "[i]n our opinion the injuries could not have been serious enough to warrant all treatment which Dr. Strauss has itemized." In spite of this, rather than investigating, in 1975 Kaplan ordered his assistant, Ina Brandt, to help Dr. Strauss prepare medical reports. Similarly, Rosenthal admitted to false billings in the Malgiolio-Pervutavich case in which Kaplan had written to his client on August 13, 1975:

> Dear Brian:
>
> Please note that Charles Malgiolio was in my office this morning, and we discussed the accident that you both were involved in on June 26th, 1974. And before I start a suit on behalf of Charley, I wanted to clear things with you to confirm whether or not you want me to press a suit on your behalf. In as much as the [adjustor] informed my office that you went to his office and told his supervisor that *you were not hurt as a result of the accident, and yet I have medical reports and bills from two doctors in my file*.

> Would you kindly contact my office and make an appointment to come in so that you may discuss the same with me in person. If I do not hear from you within the next ten days, I will assume that you no longer are interested in pursuing this matter, and I will, accordingly, close out this file. Regards, very truly yours.

(Emphasis ours).

On September 4, 1975, Kaplan wrote to Dr. Rosenthal:

> . . . enclosed herein find the self-explanatory letter of Brian Pervutavich dated August 13, 1975. In as much as I have not received a reply from him to date, I am, accordingly, closing out the file regarding his claim, and suggest that both of you and Dr. Stone contact Mr. Pervutavich direct.

Rosenthal testified that Kaplan neglected to ask him why he had issued a bill and report when his client, Pervutavich, had told the insurer he had not been injured in the accident. Kaplan simply implied in that letter "Rosenthal, you handle it."

Kaplan's repeated failure to investigate took on overtones of willfulness in the Jenkins case. McLoughlin, a lawyer employed by Kaplan, testified on cross-examination that Jenkins had told him that a medical bill was false. Instead of investigating the allegation, Kaplan refused to represent the client any further.

In spite of the above, Kaplan suggests on appeal that his employees had no reason to suspect any wrongdoing. This is not borne out by the record. Rosenthal testified that Ina Brandt would call him for another $50 or $100 in order to get the medical expenses past the $500 threshold. This is corroborated by a handwritten note from Brandt in the file related to her

husband's case handled by Kaplan which reads "bills are now at 340." Rosenthal testified that subsequent to those conversations he would submit to Kaplan false addendum bills and reports.

Even Bernstein, Kaplan's office manager, suspected some wrongdoing, although he admitted never telling Kaplan about it. Bernstein testified that some bills showed an exaggerated number of visits in relation to the client's physical appearance and the nature of the ("soft-tissue") injuries. We find it entirely permissible for the jury to have inferred that Kaplan was at least as suspicious about billing discrepancies as Bernstein. In the words of his associates, Kaplan was the "boss." While assistants performed legal and clerical tasks, appellant's role in the office was crucial. He met with clients and referred them to various doctors, including doctors Rosenthal and Hershenow. These two doctors often sent false bills and reports directly and only to Kaplan. Kaplan then reviewed the client files, containing the bills, prior to disbursing an award to a client. Kaplan also had the final say on how much to charge clients in legal fees. At the disbursement conferences (at times handled personally by Kaplan) he paid the clients, recommended to clients an amount to pay on the bills, and completed and sent the money orders to the medical providers. For Kaplan now to hide behind the facade of a high-volume caseload to suggest lack of knowledge is surely disingenuous.

The money order arrangement also permitted the jury to infer a motive, *i.e.*, Kaplan's direct economic interest from participating in the scheme. A bank officer testified that money orders were always issued sequentially (in serial numbers). Kaplan's legal assistants would purchase money orders from the bank and would give them *in blank* to Kaplan. The money orders were drawn from the client's trust fund account. The record shows a series of money orders, payable to medical providers, and then following the same sequence two money

orders purchased by Kaplan for his *personal use*. This permits an inference that, when paying to medical providers two-thirds of their bills, Kaplan pocketed the difference.

The fact that files and documents were removed from Kaplan's storage area adds to the overwhelming evidence of guilty knowledge. On February 1980, postal inspectors searched the doctors' offices. A federal grand jury returned an indictment against them a year later. An employee of Kaplan's testified that after the investigation became public, he saw Kaplan, Brandt, and Bernstein remove carbon copies of money orders and transmittal letters to doctors from Kaplan's files. This was corroborated by the testimony of Kaplan's mail clerk who said he had been ordered by Bernstein to remove documents from a storage area. The postal inspector's testimony further supports the inference of guilty knowledge. The inspector testified that, upon executing the warrant of Kaplan's storage area in March 1984 for 850 to 855 client files, he was able to search only nine or ten because certain boxes had been removed from the shelves. Bernstein, the office manager, claimed to the inspector lack of knowledge about the missing files.

While the evidence may be subject to a "reasonable hypothesis of innocence," the government need not refute every innocent explanation as long as the evidence is legally sufficient to support the guilty verdict. *United States* v. *Rivera-Rodriguez*, 808 F.2d 886, 890 (1st Cir. 1986). Our perusal of the record confirms there is sufficient evidence for a jury to convict Kaplan as charged beyond a reasonable doubt.

II. *Jury Instructions*

The district court instructed the jury that the element of knowledge under the mail fraud statute could be satisfied by proof that Kaplan "deliberately closed his eyes to what otherwise would have been obvious to him," that "[r]efusing to investigate something that cries out for investigation may indicate that the person knows what the investigation would show,"

and that willful blindness constitutes knowledge if the defendant "was aware of a high probability that particular facts existed and he did not subjectively disbelieve the facts." Kaplan argues there is insufficient evidence that he *intentionally* avoided knowledge of the illegal scheme.

To begin with, there is no question here that Kaplan asserts lack of knowledge, or that the instructions given by the court does not mandate an inference of knowledge. *See United States* v. *Picciandra*, 788 F.2d 39 (1st Cir.), *cert. denied*, 107 S. Ct. 166 (1986). The only issue is whether the "facts suggest a conscious course of deliberate ignorance." *See id.* at 46; *see also, United States* v. *Masse*, 816 F.2d 805, 812 (1st Cir. 1987) (framing the standard as whether appellant purposefully blinded himself while "knowing that a crime was likely in progress which [he] was facilitating.").

Although the list is not exhaustive, the following facts support the willful blindness instruction: (1) the testimony of Kaplan's office manager about suspected billing irregularities with respect to a client's injuries and his prolonged medical treatment; (2) evidence that insurers, and in one case a court itself, brought to Kaplan's attention unreasonable billing practices; (3) the pervasiveness of the fraud, in some cases involving Kaplan's family members. On these facts, a reasonable person should have investigated, and Kaplan deliberately failed to act as one. And Kaplan was a person capable of detecting the signs of fraudulent billing. *See Masse*, 816 F.2d at 812. Kaplan retained control over *his* firm, and his actions in mailing the insurance claims were crucial for the success of the venture. *See Krowen*, 809 F.2d at 148-50. The jury could have inferred that if Kaplan actually and positively lacked knowledge it was because he *intentionally* chose to avoid it. The instruction was apropos here.

Kaplan contends next that the court erroneously refused his request for a *Maniego* instruction. In *United States* v. *Maniego*, 710 F.2d 24, 28 (2d Cir. 1983), the court instructed the jury "that an attorney is not held to a higher standard of conduct, or legal obligation, to verify independently the truth of the information given by a client."

The government asserts that Kaplan did not specifically object under Fed. R. Crim. P. 30. We disagree. At the close of the government's case, over the prosecutor's objection, appellant distinctly requested a *Maniego* instruction, at which time the court reserved decision on the matter. After the charge, but before the jury retired to deliberate, counsel requested "an instruction on the attorney's duty of verification" (undeniably referring to *Maniego*) which the court denied. We do not think that Kaplan at the time had to *argue* for *Maniego* or repeat the magic word "objection." Counsel did what Rule 30 required of him, *i.e.*, put the trial judge on *notice* so that a possible error could be corrected before the deliberation process began. *Cf. United States* v. *Rollins*, 784 F.2d 35, 37 (1st Cir. 1986). Accordingly, the district court's ruling is subject to an abuse of discretion standard. *See Picciandra*, 788 F.2d at 46.

Appellant urges that *Maniego* was appropriate on the basis of the following excerpts from the prosecutor's closing and rebuttal arguments:

> [I]t [the complaint against Rosenthal] puts you on notice if you are a legitimate lawyer and you only want to submit legitimate bills, it would cause you to inquire, to be skeptical. Is that what Mr. Kaplan did? . . . . If you are a legitimate lawyer and you want to send legitimate bills, wouldn't you have made an inquiry? Isn't that willful blindness? Tr. 19/44.

* * *

> Mr. Keefe says that the Drs. Rosenthal and Hershenow fooled [a] lot of people. He says they fooled other attorneys. There is no evidence that they fooled other attorneys. The only evidence is that they wrote false bills for other attorneys. Tr. 19/124.
>
> * * *
>
> Do you think that [Rosenthal's false bills] would [put] a legitimate law office on notice? Do you think people would question all those handwritten bills? Tr. 19/40.

Appellant's reading of the trial transcript is too thin. The prosecutor did not attempt to create the impression that Kaplan should be held to a higher standard of care. *Id.* at 46. These comments were directed towards Kaplan's role (as a lawyer) which was central to the scheme. Neither can those isolated remarks, when tested with the record as a whole, be construed as permitting such an inference. *See id.* To the contrary, the prosecutor continually referred in his argument (we count four occasions) to a reasonable person standard regarding a duty to investigate. We find no abuse of discretion here.

III. *Limitation on the Scope of Cross-Examination*

Alan Brown was the only government witness who testified about telling Kaplan himself that a doctor's bill was false in a case in which Kaplan had represented him.

During *voir dire*, the defense sought to introduce impeachment evidence regarding Brown's use (two to four times a month) of non-prescription drugs (specifically cocaine) at the time he made the incriminating statement. Contrary to the government's contentious, Kaplan specifically sought to challenge below Brown's credibility (poor or affected memory, perception, etc.) and to show bias (a motive to falsify in the government's favor). Kaplan offered to prove that if the jury

had known that the government became "interested" in Brown's use of cocaine, and that the government had given Brown immunity in return for his testimony, it could have inferred Brown had reason to lie. But Brown, when confronted outside the presence of the jury about his cocaine use, invoked the fifth amendment privilege against self-incrimination. The government argued that limiting cross-examination would merely prevent questions "to which there would have been no answer." The district court agreed, apparently ruling under Fed. R. Evid. 401, 403, 611(a)(3), that Kaplan's line of inquiry was marginally relevant, and in any event, its unfairly prejudicial effect outweighed its probative value. The court then refused to permit any questioning that would cause Brown to invoke the fifth amendment before the jury.

Kaplan contends that the district court completely foreclosed an opportunity to cross-examine Brown on bias and impeachment in violation of his sixth amendment rights. We have said that a court can, in its discretion, restrict the scope of cross-examination only after it has afforded defendant the constitutional minimum, *i.e.*, an opportunity for effective cross-examination at trial. *See United States* v. *Tracey*, 675 F.2d 433, 437 (1st Cir. 1982). The first question then is whether Kaplan was afforded such an opportunity. In *Davis* v. *Alaska*, 415 U.S. 308 (1974), a defendant's sixth amendment rights were infringed when the court, by prohibiting *all inquiry* into a witness' probationary status as a juvenile delinquent, completely foreclosed an opportunity to show bias in favor of the prosecution. *Accord Delaware* v. *Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431 (1986).

This case is unlike *Davis* in many respects. Most important, defense counsel ably undermined Brown's credibility during cross-examination. Brown admitted at trial that he *believed* he was testifying under a grant of immunity and that his attorney had negotiated such an arrangement with the government prior to his grand jury appearance in this case. This allows us to

conclude that the jury had a sufficient basis to question this witness' motivations and biases even without the cocaine evidence. *See Tracey*, 675 F.2d at 439. Further, an effective cross-examination in *Davis* would have been crucial to the defense. In *Davis* there is no indication that the witness would or could have invoked a right to remain silent about his juvenile record. Consequently, cross-examination in *Davis* would have revealed specific information strongly suggesting bias. In this case, cross-examination of Brown would have led only to invocation of the fifth amendment. That would have helped to impeach him, because it permitted a negative inference, but would not have been as essential to the defense case as would the specific information in *Davis* regarding the witness' record and probationary status.

As to impeachment generally, counsel successfully attacked Brown's reliability and trustworthiness. Brown concededly lied to a postal inspector investigating the case and to doctors regarding his treatments. Brown also demonstrated at trial poor recollection of details regarding Kaplan's representation in his case and about his own personal life. A juror reasonably could have concluded that Brown's testimony was inherently unreliable especially as to the alleged incriminating statement made about 11 years before trial. We hold that the proscription from inquiring about cocaine use did not insulate Brown's testimony from effective cross-examination as guaranteed by the sixth amendment.

Whether the court's evidentiary ruling nevertheless constitutes an abuse of discretion is another matter. Kaplan persuasively argues that, when a non-party government *witness* invokes the fifth amendment on cross-examination at trial, the court should permit the assertion of the privilege in the presence of the jury. The invocation of the privilege acts as a form of impeachment.

In *United States* v. *Johnson*, 488 F.2d 1206 (1st Cir. 1973), the defense sought to have a witness testify on *direct* only to

have him assert the fifth amendment before the jury. We held that if "a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand." *Id.* at 1211. Our reference there to *Bowles* v. *United States*, 439 F.2d 536, 541 (D.C. Cir. 1970) (en banc), *cert. denied*, 401 U.S. 995 (1971), implied that the witness' assertion of the privilege, intended as permitting an inference of guilt or innocence, could have a disproportionate, probative impact on the mind of the average juror.

A different case is presented where, as here, the defense seeks to cross-examine a government witness within the scope of his direct and then the witness asserts the privilege. We note, first, that the impact on the jury's deliberations from asserting the privilege has to be less here than in *Johnson* from the fact that Brown did not claim the privilege comprehensively. Instead, Brown answered most questions put to him by the defense and would have refused to answer at trial only those bearing on the alleged cocaine abuse. And whatever danger exists that the jury may give too much weight to this line of questioning is small in comparison to its impeachment value. *See United States* v. *Seifert*, 648 F.2d 557 (9th Cir. 1980).

In *Seifert*, the Ninth Circuit confronted the issue before us and ratified similar questioning by drawing an analogy to *Caminetti* v. *United States*, 242 U.S. 470 (1917). *Caminetti* held that when a *defendant* voluntarily takes the stand and then refuses to testify on cross-examination (as to matters raised on direct) he can be impeached by letting the jury draw adverse inferences from his silence.

We agree with the *Seifert* court. We hold that the district court's refusal to force Alan Brown to assert his fifth amendment privilege before the jury was error. None of the permissible reasons for circumscribing the scope of a criminal defendant's constitutional right to cross-examination — harassment,

prejudice, confusion, repetitiveness, marginal relevance, for example — warranted such a ruling. *See Van Arsdall*, 106 S. Ct. at 1435. Although the fact that Brown asserted the privilege was only marginally relevant to the issue of his bias, we note Judge Weinstein's observation that "[t]he credibility of a witness can always be attacked by showing that his capacity to observe, remember, or narrate is impaired." J. Weinstein & M. Berger, 3 *Weinstein's Evidence* ¶ 607[04], at 607-55 (1987). Kaplan was entitled not to be denied the benefit of the jury's likely inference, from Brown's assertion of the privilege, that Brown was using cocaine around the times relevant to his testimony, and to the secondary inference that his powers of memory or observation thus may have been impaired. However, any error in this regard does not warrant a reversal or a new trial. Given the substantial other evidence of guilty knowledge before the jury, and the thorough cross-examination permitted here, the error is harmless beyond a reasonable doubt. *Van Arsdall*, 106 S. Ct. at 1438.

IV. *Admissibility of Statements by Joint Venturers*

Kaplan attacks the admission of statements from conversations between Drs. Rosenthal and Hershenow and between Rosenthal and Shraiar, a pharmacist. The challenged declarations relate to Rosenthal's recruitment of Hershenow in 1973, to his explanation about the referral system and partial payment method with Kaplan, and to his intention of developing a practice of cross-referrals with Hershenow in personal injury cases handled by Kaplan. Kaplan also sought to exclude on hearsay grounds Rosenthal's statement that he had requested from Shraiar (from 1976 through 1978) false bills in some of Kaplan's cases. Over defendant's specific objections, the court provisionally admitted these declarations under Fed. R. Evid. 801(d)(2)(E), subject to a *Petrozziello* finding at the end of the trial that:

> it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement[s] [were] made, and that the statement[s] [were] in furtherance of the conspiracy.

United States v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977).

We find no merit to the argument that the court cannot consider under *Petrozziello* those events occurring *after* the proferred [*sic*] statements as proof of defendant's participation in a conspiracy or a joint venture. *See United States* v. *Silvano*, 812 F.2d 754, 762 (1st Cir. 1987); *see also United States* v. *Reynolds*, Nos. 86-1870, 1871, slip op. at 5 (1st Cir. Sept. 2, 1987). A related contention is that Rosenthal's statements were inadmissible against Kaplan since he was unaware that Rosenthal had ever requested false bills from Shraiar. This claim is unavailable. *See United States* v. *Baines*, 812 F.2d 41, 42 (1st Cir. 1987) (when a party knowingly joins a conspiracy he takes responsibility for the conspirator's conduct regardless of whether he is aware of every detail).

We now review the court's findings for clear error. *United States* v. *Williams*, 809 F.2d 75, 89 (1st Cir. 1986), *cert. denied*, 107 S.Ct. 1959 (1987). The court's finding of a scheme or joint venture to defraud is undisputed. Its conclusion that defendant knowingly participated in the scheme was based on preponderant evidence on the record as a whole: (1) Kaplan's authority and control over his firm, particularly over disbursements to clients and doctors; (2) Rosenthal's meeting with Kaplan in 1973 regarding partial payment of bills in money orders; (3) the referral arrangement; and (4) Kaplan's expression of anger from Rosenthal's revelations to Hershenow. We find no clear error as to these findings.

Furthermore, we hold that the statements were made "during the course and in furtherance of the conspiracy." Fed. R. Evid.

801(d)(2)(E). The record supports that the challenged statements, occuring [*sic*] in 1973 and between 1976-1978, were within the time frame of the fraudulent scheme as charged in the indictment. And the declarations, as they advanced the objectives of the scheme were made "in furtherance" thereof. *United States* v. *Fahey*, 769 F.2d 829, 839 (1st Cir. 1985). The scheme was like a mathematical equation. On one side, Kaplan paid less than the *face* value of the bills. On the other, the face value was *higher* than their real value, since most bills submitted by Rosenthal and Hershenow were inflated. Thus, Rosenthal's statements permitted an inference that the *profitability* of the discounted payment plan with Kaplan turned on whether Shraiar understood he had to submit false bills to Kaplan and on whether Hershenow willingly accepted discounted payments from Kaplan. In that sense, the statements advanced the scheme.

V. *The Internal Medical Files and the Coconspirator Exception*

The government introduced at trial the records of Drs. Rosenthal and Hershenow and Dr. Strauss' patient cards to prove the magnitude of the fraud and to corroborate the testimony about falsification of bills. Over defendant's general hearsay objection, the court admitted the files as part of its *Petrozziello* ruling discussed before.[1] Kaplan focuses this appeal on specific portions of the Rosenthal/Hershenow files to argue against their admissibility. Appellant divides those files into two parts — first the "dictated notes" (containing accurate treatment dates) and second the "patient file cover sheets" (containing information used to generate false bills).

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[1] In view of our disposition of this matter under the coconspirator exception, we need not decide the adequacy of defendant's hearsay objections. We also find it unnecessary to reach the government's contentions that the files were admissible under the business records exception to the hearsay rule, Fed. R. Evid. 803(6).

Assuming those statements were hearsay (and the government concedes as much with respect to the dictated notes), we find no clear error in the court's ruling they were admissible as coconspirator statements under Rule 801(d)(2)(E). The record supports that (1) defendant knowingly participated in a fraudulent scheme, and (2) the statements were made during the course of the scheme. *See ante* at 20-21.

The more difficult question is whether the statements were made "in furtherance" of the scheme. Relying on *Krulewitch* v. *United States*, 336 U.S. 440 (1949), appellant maintains that the internal medical files (allegedly never seen by Kaplan) were kept to conceal any wrongdoing and thus were not "in furtherance" of the scheme. *Krulewitch* held that, *once the objectives of the conspiracy have been accomplished*, any declarations regarding efforts to conceal the conspiracy are inadmissible. *Id.* at 442; *see also United States* v. *Palow*, 777 F.2d 52, 57 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1277 (1986) (post-arrest statements not in furtherance of the conspiracy). Such is not the case before us however. Even if the doctors maintained "accurate" medical records to avoid getting caught, their actions clearly furthered the "main objectives of the conspiracy." *United States* v. *Davis*, 623 F.2d 188, 192 (1st Cir. 1980).

The main objective of the scheme here was to trick insurance companies into paying what appeared to be legitimate claims. And its success depended on whether the bills appeared truthful. In fact, Kaplan argued to the jury that the bills looked so reliable that they fooled fellow attorneys — himself included — and a few insurance companies. The following excerpt from the government's direct examination of Rosenthal underscores the importance of the internal records for insuring the "legitimacy" of the bills:

Q . . . First of all, maybe we ought to go through several documents in the file.

This is what's known as the front sheet or the cover to your file; is that correct?

A That's correct.

Q All right. And at least certainly for the initial date of visit, that would be filled out by one of your staff?

A In most cases, yes, sir.

Q All right. And then, in addition, that file would be kept in your office; and when patients came in, the date of the visit would be recorded on the form; is that correct?

A That's also correct.

Q Now, in addition, did you on occasion just put dates of visit on those forms?

A Yes.

Q Now, in connection with the preparation of your bills and reports, what use would be made of this form?

A It served a multi-purpose. The first use, obviously, is to try to keep track of the patient visits. The second use was to give the secretaries some indication of the billing procedure. Obviously, there is some financial information; also where I referred the people. It's sort of an all in one type sheet.

Q In the course of preparing your reports and the attached bills, how did you typically get the information from you to your secretaries for the actual typing?

Q For the billing?

Q Yes.

A It was — that's — what they saw on here is what they typed the bill off of [sic].

Q In other words, you would give them instructions that they were to show as dates of visits of the information recorded on the front of the form?

A That's correct.

Q And if you falsely inflated a file, you would make a notation on the front of the file of the date of visit?

A That's correct.

The records were essential for keeping accurately *false* bills. And it was through the collection of these bills, after all, that the conspirators realized the fruits of their fraudulent endeavors. These statements contributed to the objectives and ultimate success of the scheme, and were admissible evidence against Kaplan. *See Fahey*, 769 F.2d at 839.[2]

VI. *The Evidence Regarding the Flood at the Defendant's Home and the Search of his Law Office Storage Area*

The court admitted a stipulation that certain documents from Kaplan's client files subpoenaed by the government were destroyed in a 1983 flood occurring at defendant's vacation cottage. The government tried to show at trial this was a false exculpatory statement. As far as the record shows, Kaplan objected below only for lack of relevance. Fed. R. Evid. 401. We agree with the court's ruling. False exculpatory declarations are relevant to show a guilty state of mind. *Wilson* v.

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[2]The court also ruled that the internal medical records were relevant, probative, and not unfairly prejudicial to Kaplan. Fed. R. Evid. 401, 403. We find no abuse of discretion as to that finding. *See United States* v. *Jarabek*, 726 F.2d 889, 903 (1st Cir. 1984).

United States, 162 U.S. 613, 620-621 (1896). Whether the stipulation was false or not was strictly for the jury to decide, and had no bearing upon its admissibility under Rule 401.

As to the removal of files and search evidence, Kaplan objected for lack of probative value. Fed. R. Evid. 403. Kaplan's principal claim is that the removal of the files permitted *only* an inference that Kaplan intended to protect attorney-client confidences. The district court concluded that since the jury could have inferred some ulterior motive besides protecting client confidences, the evidence was probative and not unfairly prejudicial to appellant. We find no abuse of discretion to upset this finding. *See Jarabek*, 726 F.2d at 903.

VII. *Conclusion*

Appellant was fairly tried and squarely convicted. The court properly denied his motions for a new trial and judgment of acquittal.

Affirmed.